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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. ——

UNITED STATES OF AMERICA

v.

MADISON COUNTY BOARD OF EDUCATION ET AL.

UNITED STATES OF AMERICA

v.

GULFPORT MUNICIPAL SEPARATE SCHOOL DISTRICT ET AL.

UNITED STATES OF AMERICA

v.

BILOXI MUNICIPAL SEPARATE SCHOOL DISTRICT ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above-captioned cases on January 7, 1964.

OPINIONS BELOW

The opinions of the district courts are reported as *United States* v. *Madison County Board of Education, et al.*, 219 F. Supp. 60 (N.D. Ala.) (Mad. R. 49–52);[1] *United States* v. *Gulfport Municipal Separate School District, et al.*, and *United States* v. *Biloxi Municipal School District, et al.*, 219 F. Supp. 691 (S.D. Miss.) (Gulf. R. 36–47, Bil. R. 37–39). The opinion of the court of appeals (Appendix A hereto, *infra*, pp. 23–33) is reported at 326 F. 2d 237.

JURISDICTION

The judgments of the court of appeals (Appendices B, C, and D, *infra*, pp. 34–36) were entered on January 7, 1964. Rehearing *en banc* was denied on April 10, 1964. The time for filing a petition for a writ of certiorari was extended by Mr. Justice Black to September 7, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether assurances given by local school districts accepting federal financial assistance that they would treat the children of Service personnel "on the same terms, in accordance with the laws of the State" as they treated local children now bars racial segregation of the "federal" children.

2. If so, whether the United States may require specific performance of the assurances by judicial proceedings.

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[1] References to the three records below will be cited as follows: Madison County and Huntsville (Mad. R.); Biloxi (Bil. R.); and Gulfport (Gulf. R.).

3. Whether, independently of the assurances, the United States has standing to assert, in a suit brought in its name, the constitutional rights of its Service personnel.

STATUTES INVOLVED

20 U.S.C. 636(b) provides in pertinent part:

> (1) Each application by a local educational agency shall set forth the project for the construction of school facilities for such agency with respect to which it is filed, and shall contain or be supported by—
>
> * * * * *
>
> (F) assurance that the school facilities of such agency will be available to the children for whose education contributions are provided in this chapter on the same terms, in accordance with the laws of the State in which the school district of such agency is situated, as they are available to other children in such school district.
>
> * * * * *

20 U.S.C. 641 provides:

> (a) Whenever the Commissioner of Education, after reasonable notice and opportunity for hearing to a local educational agency, finds * * * (3) that any assurance given in an application is not being or cannot be carried out, the Commissioner may forthwith notify such agency that no further payment will be made under this chapter with respect to such agency until there is no longer any failure to comply or the diversion or default has been corrected or, if compliance or correction is impossible,

until such agency repays or arranges for the repayment of Federal moneys which have been diverted or improperly expended.

STATEMENT

This litigation concerns three suits instituted by the United States to enjoin the respondent school districts and officials from discriminating against children of Negro military and civilian personnel stationed or employed at the Redstone Arsenal in Madison County, Alabama; and at the Keesler Air Force Base and a Veterans Administration Hospital in Harrison County, Mississippi.

On January 18, 1963, the United States filed suit in the Northern District of Alabama against the Madison County Board of Education[2] and the City of Huntsville Board of Education (Mad. R. 10–29). On the same day a similar complaint was filed in the Southern District of Mississippi against the Biloxi Municipal Separate School District and the Gulfport Municipal Separate School District[3] (Gulf. R. 4–25, Bil. R. 2–23).

The complaints alleged that the respondents maintained separate schools for Negro and white pupils (Mad. R. 16, 28; Gulf. R. 22–23; Bil. R. 12–13), and that it was their "policy and practice" to assign Negro

[2] In each case the members of the local school boards and the superintendent of schools were also joined as party defendants. For the sake of brevity, we will refer only to the respective school boards or districts, *i.e.*, Madison County Board, Biloxi School District.

[3] The claims against the Gulfport and Biloxi School Districts were severed on April 22, 1963 (Gulf. R. 2–3).

children to "Negro" schools and white children to "white" schools (Mad. R. 16, 28; Gulf. R. 23; Bil. R. 13). It was further alleged that these school districts received since 1950 a combined total of $8,332,143.09 for the construction and improvement of schools under the School Construction Act (20 U.S.C. § 631 *et seq.*).[4]

In connection with each of its applications for a grant of federal school construction funds, the respective school boards gave written assurances, as required by 20 U.S.C. 636(b)(1)(F), that the school facilities in question would—

> * * * be available to the children for whose education contributions are provided * * * on the same terms, in accordance with the laws of the State in which applicant is situated, as they are available to other children in applicant's school district [Mad. R. 16, 27–28; Gulf. R. 22; Bil. R. 11–12].

Each of the boards, it was alleged, "has failed and is now failing and refusing to perform each of its assurances", in that they did not make the public school facilities available to Negro dependents of members and employees of the Armed Forces of the United States upon the same terms as such facilities are made available to white children (Mad. R. 17, 28–29; Gulf. R. 23; Bil. R. 13).

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[4] These payments are broken down as follows:

Madison County	$527,933.92	(Mad. R. 31)
Huntsville	4,404,861.47	(Mad. R. 33–34)
Gulfport	1,240,478.35	(Gulf. R. 17–22)
Biloxi	2,158,869.35	(Bil. R. 6–12)

This conduct, it was further alleged, is unconstitutional under the Fourteenth Amendment and impairs the "service and morale" of military personnel and civilian employees of the United States (Mad. R. 17–18; Gulf. R. 15; Bil. R. 13–14).

The government sought orders enjoining the respondents from "segregating or discriminating against, among, or between, upon the basis of their race or color, any dependents of the members or employees of the Armed Forces of the [petitioner] in the operation of public schools under their jurisdiction * * *" (Mad. R. 29; Gulf. R. 24, Bil. R. 22).

In each of the three cases motions to dismiss were filed (Mad. R. 41–48; Gulf. R. 30–31; Bil. R. 25–26) and granted (Mad. R. 52, Gulf. R. 47; Bil. R. 49–50).

The Mississippi district court held in the *Gulfport* and *Biloxi*[5] cases that the statutory assurance merely provides for equality of treatment in fact between the children of federal personnel and local children, and that, since the local children were segregated by race, it was permissible also to segregate the federal children in the same manner (Gulf. R. 41–45). In any event, in the court's view, the specific remedy provided for in the Act (20 U.S.C. 641(a), *supra*) is exclusive (Gulf. R. 41–47). On the Fourteenth Amendment claim, the court held that "[o]nly natural persons are entitled to the privileges and immunities

[5] The district court in the *Biloxi* case adopted the opinion it had rendered earlier in the *Gulfport* case (Bil. R. 37–39).

of the Fourteenth Amendment and the United States is not a 'person' nor 'within the jurisdiction' of a State under the terms and provisions thereof * * *" (Gulf. R. 39–41).

The Alabama district court, referring with approval to the *Gulfport* decision (Mad. R. 49–50), further held that the remedy and relief provided in the Act under consideration are vested in the Commissioner of Education and not in the courts (Mad. R. 52).

The court of appeals, affirming the judgments, held that the statutory provisions authorizing the Commissioner to withhold payment of future funds for breach of an assurance announced the exclusive remedy (App. A, *infra*, p. 30). The court summarily rejected the contention that the United States had standing, independent of the contract, to assert the Fourteenth Amendment rights of Service personnel (App. A, *infra*, p. 33).*

REASONS FOR GRANTING THE WRIT

The school boards involved, in consideration of millions of dollars in federal funds for school construction, gave written "assurance," as explicitly required by statute (20 U.S.C. 636(b)(1)(F)), that their schools would be available to children of federal military and civilian personnel, "on the same terms, in accordance with the laws of the State in which the school district * * * is situated, as they are available

* In three of the areas, some limited amount of desegregation has taken place as a result of private lawsuits, but the litigation rights of the United State remain unrecognized. In Gulfport there has been no desegregation whatever. Accordingly, the cases are not moot.

to" local children. The court below suggested that this promise, even today, does not involve an undertaking by the recipient to offer a desegregated education, and went on to hold that, in any event, the "assurance" was not judicially enforceable at the suit of the United States. In our view, the court erred on both points. In addition, we believe that, apart from contract, the United States was entitled to assert, *parens patriae*, the constitutional rights of its Service personnel. Finally, we point out that the decision below has important implications extending far beyond the school construction program.

1. Undeniably, when the language of the "assurance" was incorporated in the statute, in 1950, it was intended to permit racial segregation of federal employees' children where local children were so treated in accordance with State laws. That result, of course, was predicated on the assumption that State segregation laws were constitutional and that educational equality was consistent with racial separation. Plainly, Congress did not purport to sanction unconstitutional practices. On the contrary, it required local school districts receiving federal funds to bind themselves to treat the children of federal employees "on the same terms" as all other children—whatever equality might come to mean—and to give the "federal" children the same benefits which local law—whatever it might be at any future time—conferred on local children. Today, under compulsion of the Constitution as construed in this Court's decisions, the laws of Alabama and Mississippi prohibit assign-

ment of pupils on a racial basis, and the mandate of equal treatment prevents segregating Negro children. Thus, the change of law and the broadening of the concept of equality have altered the content of the "assurance."

a. The required assurance (see Section 636(b)(1)(F)) given by all of the school boards involved in these cases expressly states that the "terms" by which federal children are to be treated are those which are "in accordance with" State law. In other words, State law—not illegal local practices—was to be the measure of the school board's obligations. Whether or not local children have attempted to exercise their rights, or have succeeded in their attempt, does not affect the contractual obligation of the local school district to educate "federal" children in accordance with present State law.

The pupil placement laws of Alabama (Title 52, § 61(4), Code of Alabama, Recomp.) and Mississippi (Section 6334—01, Mississippi Code (1962 Cum. Supp.) preclude the assignment of children to public schools on racial grounds. The Alabama constitutional provisions and statutes which once required racial segregation have been repealed and the present State pupil placement laws have been construed as prohibiting racial considerations. *Shuttlesworth* v. *Birmingham Board of Education,* 162 F. Supp. 372, 379–380, 384 (N.D. Ala.), affirmed, 358 U.S. 101.

The Mississippi pupil placement law (Mississippi Code, § 6334–02), enacted in 1954, enumerates a number of criteria for school assignments, but does not

mention race. To read into section 6334–02 authorization for making assignments upon the basis of race would render the statute unconstitutional on its face.[7] And in requiring that the obligation to federal children be measured by State law, Congress meant, of course, State law conforming to the Constitution.[8]

Any other construction of the federal School Construction Act would subject that statute itself to grave constitutional difficulties. See *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (C.A. 4), certiorari denied, 376 U.S. 938, where the court ex-

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[7] *Jeffers* v. *Whitley*, 309 F. 2d 621, 627 (C.A. 4); *Bradley* v. *School Board of Richmond, Va.*, 317 F. 2d 429, 432, 436–437 (C.A. 4); *Beckett* v. *School Board*, 185 F. Supp. 459, 462 (E.D. Va.), affirmed *sub nom. Forley* v. *Turner*, 281 F. 2d 131 (C.A. 4); *Greene* v. *School Bd.*, 304 F. 2d 118, 122–123 (C.A. 4); *Northcross* v. *Board of Education*, 302 F. 2d 818, 822–823 (C.A. 6), certiorari denied, 370 U.S. 944; *Boson* v. *Rippy*, 285 F. 2d 43, 48 (C.A. 5); *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491, 499 (C.A. 5); *Augustus* v. *Board of Public Instruction*, 306 F. 2d 862, 864, 869 (C.A. 5); *Goss* v. *Board of Education*, 373 U.S. 683, 688. The validity of the pupil placement laws is dependent upon a construction prohibiting race as a factor in assignment. *Bush* v. *Orleans Parish School Board*, 138 F. Supp. 337 (E.D. La.), affirmed, 242 F. 2d 156 (C.A. 5), certiorari denied, 354 U.S. 921; *Adkins* v. *School Board*, 148 F. Supp. 430 (E.D. Va.), affirmed, 246 F. 2d 325 (C.A. 4), certiorari denied, 355 U.S. 855.

[8] Any provisions purporting to authorize unconstitutional action are as if they were "no law." *Ex parte Royall*, 117 U.S. 241, 248; *United States* v. *Realty Co.*, 163 U.S. 427, 439.

Even if it be thought that Alabama and Mississippi law are silent on the racial question, the same result obtains, for the Constitution of the United States is a part of the "laws" of every State. See, *e.g.*, *Neal* v. *Delaware*, 103 U.S. 370, 389–391. It therefore follows that the local practice of segregation is prohibited by the "laws" of Alabama because such segregation is prohibited by the Fourteenth Amendment.

cised from a statute authorizing grants to hospitals language which purported to authorize racial discrimination in the operation of the hospital program.

b. Even if one ignores State law and looks only to actual practice, the same result is compelled by the language in the assurance that the school facilities would be available to the federal children "on the same terms * * * as they are available to other children" in the district.

Respondent cannot deny that, at least with respect to some federal children, the school facilities in the districts involved are not available on the same terms as they are available to some of the local children; *i.e.*, facilities are not available to the Negro federal children which are available to the local white children. The only defense that could be asserted in support of this disparity of treatment is that the school boards are similarly discriminating against the local Negro children.

But there is nothing in the assurance to suggest that the obligation to the federal children is to be measured by the treatment given to any particular racial group in the local school population. The real defense of respondents on this aspect of the case is that the federal children may be treated unconstitutionally because respondents treat other children unconstitutionally. A federal court, particularly a court of equity, should not accept a defense which in effect requires the ratification of unconstitutional action. Cf. *Hurd* v. *Hodge*, 334 U.S. 24.

c. The court below indicated that, in its view, no school board in either Alabama or Mississippi would

enter into a contract to provide for even partial desegregation of the races in public schools under its jurisdiction. From this the court concluded, by way of *dictum*, that there was no meeting of the minds and hence no contract.[9]

This conclusion was incorrect. The parties agreed that school facilities were to be available to the federal children in accordance with State law, whatever State law might be from time to time. If respondents thought they might be able to make racial distinctions, they either misread the law or did not foresee a change in the law. Their mistake, if any, was a mistake of law, not of fact, and does not lead to rescission of the contract. *Heath* v. *A.B. Dick Co.*, 253 F. 2d 30, 35 (C.A. 7); see, also, *Upton* v. *Tribilcock*, 1 Otto 45, 50; *Bank of the United States* v. *Daniel*, 12 Pet. 32, 39–40.

Moreover, respondents can hardly be said to have changed their position in reliance upon any understanding that they could continue to segregate. Since 1954 it has been clear that they had a duty under the Constitution to cease doing so. They can hardly assert reliance upon an understanding of their right to engage in conduct which is and has been unlawful for a decade.[10] Several of the assurances were given after 1954.

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[9] These cases arise on motions to dismiss. There was no evidence concerning respondents' intentions.

[10] Their position in this respect is no different than that of the collective body of Southern voters who approve school bond issues before the *Brown* decision, or the hospitals in *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (C.A. 4), which unsuccessfully relied on language of a federal statute which purported to authorize racial segregation.

2. Under familiar principles, it would seem clear that the assurances given by the local school districts in return for federal funds constituted binding promises[11] which the United States, like any other contracting party, might sue to enforce, notwithstanding the absence of any specific statutory authorization.[12] The court below held, however, that the government could not obtain judicial enforcement in the premises because (1) the doctrine of "primary jurisdiction" requires the Commissioner of Education to use the special remedies available to him under 20 U.S.C. 641, and (2) where a general liability created by statute "is coupled with a provision for a special remedy, that remedy, and that alone, must be employed", citing *Pollard* v. *Bailey*, 20 Wall. 520, 527. We dispute this analysis.

a. The doctrine of "primary jurisdiction" is not relevant here. It refers private litigants to adminis-

[11] *Burke* v. *Southern Pacific R.R.*, 234 U.S. 669; *United States* v. *Northern Pac. Ry.*, 256 U.S. 51, 63; *Helvering* v. *Northwest Steel Mills*, 311 U.S. 46; *Oregon & California R.R.* v. *United States*, 238 U.S. 393; *United States* v. *Northern Pac. Ry.*, 311 U.S. 317. See also, *United States* v. *Prince George County School Board*, 221 F. Supp. 93 (E.D. Va.); *United States* v. *Sumter County School District No. 2*, No. A.C.-1469 (E.D. S.C.) decided July 29, 1964.

[12] *Dugan* v. *United States*, 3 Wheat. 172, 181; *Cotton* v. *United States*, 11 How. 229, 231; *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 151; *Jessup* v. *United States*, 106 U.S. 147, 152; *United States* v. *Tingey*, 5 Pet. 115, 127-128; *United States* v. *Prince George County School Board*, *supra*; *United States* v. *Sumter County School District No. 2*, *supra*.

trative agencies for an initial determination of the agency's views. It has no application where suit is brought by the agency itself or by the United States since the views of the agency are implicitly expressed by the filing of the lawsuit. *C.A.B.* v. *Modern Air Transport,* 179 F. 2d 622, 626 (C.A. 2); 3 Davis, *Administrative Law Treatise* 19.02, pp. 13–14.[13] Moreover, the doctrine applies only where the jurisdiction of the courts is merely postponed, not where, as here, it is ousted altogether. *United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 353; *United States* v. *Western Pac. R. Co.,* 352 U.S. 59, 63–64. Finally, the doctrine is not ordinarily applicable to questions of contract interpretation and pure issues of law; it is at least largely confined to matters of specialized administrative knowledge. *Great Northern Ry. Co.* v. *Merchants Elevator Co.,* 259 U.S. 285, 291, reaffirmed in *United States* v. *Western Pac. R. Co.,* 352 U.S. 59, 64–65, 69. Accord: *N.Y.S. & W.R.R. Co.* v. *Follmer,* 254 F. 2d 510, 513 (C.A. 3).

b. This Court has specifically held that the rule of *Pollard* v. *Bailey* does not apply to suits brought by the United States. *Dollar Savings Bank* v. *United States,* 86 U.S. 227; *United States* v. *Stevenson,* 215

[13] The Commissioner of Education has testified that the Department of Health, Education, and Welfare "has participated with the Department of Justice in the preparation and conduct of these suits, and fully supports this litigation." Hearings before the Select Subcommittee on Education and Labor, House of Representatives, 88th Cong., 1st Sess., on H.R. 4878, H.R. 4880, and similar bills, on April 2, 1963, pp. 14–15. There obviously was no need to seek the view of, or a determination by, the Commissioner of Education.

U.S. 190; *United States* v. *Chamberlin*, 219 U.S. 250, 261; see, also, *United States* v. *Silliman*, 167 F. 2d 607, 611 (C.A. 3); *Territory of Alaska* v. *American Can Co.*, 269 F. 2d 471, 477 (C.A. 9); cf. *United States* v. *Republic Steel Corp.*, 362 U.S. 482.

The administrative remedies under the statute are patently inadequate.[14] In the view of the court of appeals, the inadequacy is a matter solely for rectification by the Congress. But it is settled that where the statutory remedy is inadequate, it is presumed that Congress intended the usual judicial remedies to remain available (since otherwise the purposes of the program would obviously be impaired). *Shriver* v. *Woodbine Savings Bank*, 285 U.S. 467, 477–479; *Territory of Alaska* v. *American Can Co.*, *supra*, at 477.

Section 640 of the Act, which empowers the Commissioner to operate his own schools for children who reside on federal property, has no application here since the majority of children involved live "off base" (Mad. R. 28; Bil. R. 12).

3. Independently of its action on the contract, the United States sought to enforce the constitutional

[14] Section 641(a) of the Act authorizes the Commissioner of Education to cut off further payments if he finds that any assurance given in the application is not being carried out, or if compliance or correction is impossible, until moneys improperly diverted or expended have been repaid. If the recourse authorized by this section were the sole means of enforcing the assurance, the assurance would obviously be ineffective beyond the date that any given project was completed. This "would defeat the declaration of purpose of the statute set forth in 20 U.S.C. 631." *United States* v. *Prince George County School Board*, 221 F. Supp. 93, 102–103 (E.D. Va.).

right of its employees to be free of public discrimination. While, in the court below, we emphasized the resulting injury to the government and alleged an interference with the "war power," the claim fairly comprised the question whether the United States, both because it is indirectly injured and because it is, in a real sense, the "guardian" of the Service personnel affected, may represent them in court when their assignment subjects them to unconstitutional treatment. We submit that, in these circumstances, the special relationship between the government and its employees is sufficiently close to permit—indeed, to require—the United States to assert their constitutional claims.

The principle here is the same as that which allows the government to vindicate the rights of Indians (e.g., *Heckman* v. *United States*, 224 U.S. 413; *United States* v. *Osage County*, 251 U.S. 128), and, indeed, of servicemen with respect to their tax immunity (*United States* v. *Arlington County*, 326 F. 2d 929 (C.A. 4)), or which permits a school board to represent its students (*Brewer* v. *Hoxie School District*, 238 F. 2d 91 (C.A. 8); *Bush* v. *Orleans Parish School Board*, 191 F. Supp. 871, 875 (E.D. La.), affirmed, 367 U.S. 908). See, also, *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 458–460; *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 445–452. The doctrine of *parens patriae* is appropriately invoked in this context because the government is, at least indirectly, responsible for the serviceman's plight. It is necessary, not as mere matter of convenience, but because, if the United States did not assert them, the fundamental rights of the affected

children would often go forfeit. Indeed, the soldier temporarily assigned to a new base, even if he is financially able, is discouraged from initiating litigation which will probably not benefit his own children.

There is, of course, no constitutional bar to the assertion of personal constitutional rights by the United States. *United States* v. *Raines*, 362 U.S. 17, 27. Nor does any statute stand in the way. Title IV of the Civil Rights Act of 1964, it is true, circumscribes the authority of the Attorney General to initiate school desegregation suits in ordinary circumstances. But it governs only with respect to litigation which, formerly, the government was thought unauthorized to institute. The new law has no application to that limited sphere of special interest and responsibility in which the United States could always act. Indeed, section 1103 of the 1964 Act expressly provides that "Nothing in this Act shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General or of the United States or any agency or officer thereof under existing law to institute or intervene in any action or proceeding." The absence of specific statutory authority is, of course, irrelevant. See *United States* v. *California*, 332 U.S. 19, 27; *Sanitary District of Chicago* v. *United States*, 266 U.S. 405, 425–426; *Kern River Co.* v. *United States*, 257 U.S. 147, 154–155; *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 278–280, 284–285. We rest on the inherent power of the United States, as guardian of the rights of Service personnel, to vindicate them in court.

4. The issues presented here—whether school boards in "impacted areas" have an obligation to desegregate the federal children and whether the United States may sue to compel them to do so—are of substantial public importance.

a. In the seventeen Southern and Border States, the United States has contracted under the school construction program with 587 separate school authorities for the education of dependents of federal military and civilian personnel.[15] The decision of the court below potentially affects the contractual obligations of a great many of these school districts.[16]

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[15] Throughout the nation, 1891 local educational agencies have obtained funds for 5,120 building projects under the school construction statute. More than a billion dollars has been expended over a period of fourteen years.

[16] We do not overlook the fact that under Title IV of the Civil Rights Act of 1964, the Attorney General may, in some circumstances, bring suit to enforce the constitutional rights of school children. However, this authority is both limited and conditional. Under Section 407 of the Act, the Attorney General may institute a school desegregation suit only (1) after receiving a written complaint by the parent of a student who has been treated discriminatorily, (2) if the complainant is "unable * * * to initiate and maintain appropriate legal proceedings for relief" because he cannot "bear the expense of the litigation or * * * obtain effective legal representation" "either directly or through interested persons or organizations," or because "such litigation would jeopardize [his or his family's] personal safety, employment or economic standing," and (3) "the institution of [such] an action will materially further the orderly achievement of desegregation in public education," provided (4) that the local school, after notice and "a reasonable time to adjust the conditions [complained of]," has failed to act. It is not clear that Title IV permits the Attorney General to sue to compel the school district to open its schools to children residing on the federal base when all of them have been denied admission, as in Sumter County, S.C. (see, *infra*, p. 19).

Since the assurances upon which we rely in these cases are the same assurances upon which we would depend in order to compel a school board to make schools available to *any* federal children, white or Negro, the decision means that a school board is at liberty to accept very substantial federal funds over several years, build schools with the money, and then refuse outright to educate *any* of the federal children, whether or not on a desegregated basis. If the decision below is correct, there would be no affirmative means to make the schools serve the purposes for which the grants were made.

Refusal of a school district to educate federal children is not a mere academic hypothesis. On May 11, 1964, School District No. 2 of Sumter County, South Carolina, after having received grants totaling an estimated $910,465.33 since 1950 for the construction and improvement of certain schools necessary and desirable for the instruction of the 970 children on Shaw Air Force Base and other federal children living off the Base, directed a letter to the Commanding Officer of the Shaw Air Force Base which read in part:

> By direction of the Board of Trustees of Sumter County School District Number Two, you are herewith advised that said District does not feel that it can longer assume the responsibility for the education of the children living on Shaw Air Force Base, effective 1 July, 1964.

The United States brought suit on July 2, 1964, to enjoin that Board from closing the schools of the district to the federal children. The United States District Court for the Eastern District of South Carolina,

expressly disagreeing with the court of appeals in the instant cases, found the contract between the United States and the local board to be enforceable in equity notwithstanding the administrative remedies. *United States* v. *Sumter County School District No. 2*, No. A.C.–1469 (E.D. S.C.) decided July 29, 1964. To similar effect, see *United States* v. *Prince George County School Board*, 221 F. Supp. 93 (E.D. Va.).

If the ruling in the present case is not reversed, there is a danger that other school districts, especially those situated within the Fifth Circuit, may, in the hope of lessening pressures for desegregation, seek to escape their obligation for the education of all children living on Federal property.[17] Such action, if not correctible promptly by injunctive proceedings, could disrupt the education of these children, for whom no alternative schooling could be provided without serious delay.

b. The ruling below has potential importance beyond the School Construction Act; it casts doubt upon promissory assurances exacted as conditions of other federal grants, where Congress has not specified the means of enforcement after the grants are paid in full. Particularly under grants for the construction of facilities, which (unlike grants for operation) involve no continuing relationship between the federal government and the grantee, denial of enforcement through injunction would deprive the government of any effective means to secure compliance with conditions

[17] In some cases, as where the Federal property is not geographically within the school district, the assurance may provide the only legal compulsion for the education of these children.

that Congress has seen fit to require. As the court pointed out in the *Sumter County* case, *supra*, a power to withhold grants is usually of little force once the building is completed and the grant has been paid in full.

Under the Hospital Survey and Construction (Hill-Burton) Act,[18] for example, some 4,900 hospital projects have received federal aid with assurances by the sponsors against discrimination on the ground of race, creed, or color.[19] Many of these are non-governmental institutions, against which the federal government apparently has no recourse[20] except action to enforce the assurance. Title VI of the Civil Rights Act of 1964, forbidding discrimination on the ground of race, color, or national origin in all programs receiving federal financial assistance, can hardly be carried out effectively—at least in the case of grants for construction—

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[18] 42 U.S.C. 291 *et seq.* The statute provides a right of recovery from the institution if within 20 years it is transferred for a nonmedical use or in certain other contingencies, but not for breach of this assurance. 42 U.S.C. 291h(e). Funds may be withheld from the State on various grounds (42 U.S.C. 291j), but withholding funds for other projects is not in itself a sanction against the institution which has completed its own construction.

[19] 42 U.S.C. 291e(f), 291 h(a)(C).

[20] Title III of the Civil Rights Act of 1964 authorizes action by the Attorney General, under certain conditions, in case persons are "denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision thereof," other than a public school or college. Whatever the precise scope of this authority, it apparently does not reach all institutions which may have received federal financial aid in their construction.

except by reliance upon assurances given by the grantees. Here, again, many non-governmental grantees [21] will be involved and the availability of injunctive relief may be of crucial importance.[22]

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

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SEPTEMBER 1964.

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[21] See, for example, Higher Education Facilities Act of 1963, 77 Stat. 363.

[22] Title VI provides for enforcement by withholding funds (where there are still funds otherwise payable), or "by any other means authorized by law." Of this clause Senator Ribicoff, speaking for the sponsors of the bill, said:

> For example, the most effective way for an agency to proceed would often be to adopt a rule that made the nondiscrimination requirement part of a contractual obligation on the part of the recipient. Then violation of such a requirement would normally give the agency the right to bring a lawsuit to enforce its own contract; or, in the absence of a technical contract, the agency would have authority to sue to enforce compliance with its own regulations. All of these remedies have the obvious advantage of seeking to end the discrimination, rather than to end the assistance [Cong. Rec., June 9, 1964, p. 12690].

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 20668

UNITED STATES OF AMERICA, APPELLANT

versus

MADISON COUNTY BOARD OF EDUCATION, ET AL., APPELLEES

Appeal from the United States District Court for the Northern District of Alabama

No. 20772

UNITED STATES OF AMERICA, APPELLANT

versus

GULFPORT MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL., APPELLEES

Appeal from the United States District Court for the Southern District of Mississippi

No. 20811

UNITED STATES OF AMERICA, APPELLANT

versus

BILOXI MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL., APPELLEES

Appeal from the United States District Court for the Southern District of Mississippi

(January 7, 1964)

Before RIVES and CAMERON, Circuit Judges, and HUNTER, JR., District Judge

RIVES, Circuit Judge: These three appeals, though briefed separately, were argued orally at the same time. Each is an appeal from a judgment dismissing a complaint filed by the United States. In each case the United States sought to enjoin the local school board in the operation of the public schools under its jurisdiction from segregating upon the basis of race or color the children of members and civilian employees of the Armed Services. The opinions of the district courts are reported as *United States* v. *Madison County Board of Education*, N.D. Ala. 1963, 219 F. Supp. 60; *United States* v. *Biloxi Municipal School District* and *United States* v. *Gulfport Municipal Separate School District*, S.D. Miss.

1963, 219 F. Supp. 691. An appeal to this Court from a similar ruling in *United States* v. *Bossier Parish School Board,* W.D. La. 1963, 220 F. Supp. 243, has not yet been heard.

In each of the cases the complaint filed by the United States was based upon two grounds: (1) that the local educational agency had contracted not to segregate the children, and (2) that their segregation burdens the exercise of the war power of the United States.[1]

We think it clear that the defendants are not under such a contractual obligation to the United States as may be specifically enforced by injunction not to assign federally connected children to local schools on the basis of race or color. No one would be so rash as to claim that a local school board in either of the "hard core" States of Alabama or Mississippi would intentionally enter into a contract which it understood to provide for even partial desegregation of the races in the public schools under its jurisdiction. A more improbable official action of such a local school board can scarcely be imagined. Indeed the complaints do not claim that the local boards understood that any such effect would ensue from any contract.

The theory of the complaints is that the acceptance of federal aid for the operation of the public schools and for school construction in areas affected by federal activities and the assurances required as a condition of such aid have so obligated the local educational agencies. We do not agree.

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[1] In *United States* v. *County School Board of Prince George County, Va.*, E.D. Va. 1963, 221 F. Supp. 93, after a trial on the merits the district court entered judgment for the United States on ground (1), but expressed its opinion against the United States on ground (2).

The complaints refer to two statutes, both originally enacted in September 1950. The briefs do not seriously rely upon one of those statutes, the one providing for federal financial assistance in the operation of the public schools in areas affected by federal activities, now appearing as Chapter 13 of Title 20, United States Code. Nothing can be found in that Chapter relating expressly or impliedly to the assignment of federally connected children on the basis of race or color. The congressional declaration of policy is continued in section 236 of Title 20:

> "In recognition of the responsibility of the United States for the impact which certain Federal activities have on the local educational agencies in the areas in which such activities are carried on, the Congress declares it to be the policy of the United States to provide financial assistance (as set forth in this chapter) for those local educational agencies upon which the United States has placed financial burdens by reason of the fact that—
>
> "(1) the revenues available to such agencies from local sources have been reduced as the result of the acquisition of real property by the United States; or
>
> "(2) such agencies provide education for children residing on Federal property; or
>
> "(3) such agencies provide education for children whose parents are employed on Federal property; or
>
> "(4) there has been a sudden and substantial increase in school attendance as the result of Federal activities." 20 U.S.C.A. § 236.

Pursuant to that policy the federal Commissioner of Education has continued each year to make substantial payments to local educational agencies in areas affected by federal activities even where it was well known that all children in the public schools were strictly segregated on the basis of race or color. It

may be that the Commissioner had no option to decline to make such payments in the light of the specific provisions of the statute disavowing any federal control over the operation of the public schools. Section 241 (f) provides:

> "(f) In the administration of this section, the Commissioner shall not exercise any direction, supervision, or control over the personnel, curriculum, or program of instruction of any school or school system." 20 U.S.C.A. § 241(f).

Section 242(a) provides:

> "(a) In the administration of this chapter, no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the personnel, curriculum, or program of instruction of any school or school system of any local or State educational agency." 20 U.S.C.A. § 242(a).

As stated, that statute is not seriously relied on in the briefs or arguments for the United States. The statute more seriously urged is that providing for school construction in areas affected by federal activities, Chapter 19 of Title 20, United States Code. The congressional purpose is expressed in what is now section 631 of Title 20:

> "The purpose of this chapter is to provide assistance for the construction of urgently needed minimum school facilities in school districts which have had substantial increases in school membership as a result of new or increased Federal activities. There are authorized to be appropriated for the fiscal year ending June 30, 1959, and each fiscal year thereafter, such sums as the Congress may determine to be necessary for such purpose. Sums so appropriated, other than sums appropriated for administration, shall remain available until expended."

Following that purpose, the federal Commissioner of Education has continued each year to make large payments for construction of local public schools even where it was well known that a policy of strict racial segregation was enforced. Again, it may be that the Commissioner had no alternative in view of the specific disavowal of federal control contained in section 642(a):

> "(a) In the administration of this chapter, no department, agency, officer, or employee of the United States shall exercise any direction, supervision, or control over the personnel, curriculum, or program of instruction of any school or school system of any local or State educational agency." 20 U.S.C.A. § 642(a).

The particular reliance of the United States is upon Assurance (F), and more specifically upon the clause of that Assurance which we italicize below in quoting several assurances required to be made in the application of a local educational agency for payment:

> "(b)(1) Each application by a local educational agency shall set forth the project for the construction of school facilities for such agency with respect to which it is filed, and shall contain or be supported by—
>
> "* * *
>
> "(B) assurance that such agency has or will have title to the site, or the right to construct upon such site school facilities as specified in the application and to maintain such school facilities on such site for a period of not less than twenty years after the completion of the construction;
>
> "(C) assurance that such agency has legal authority to undertake the construction of the project and to finance any non-Federal share of the cost thereof as proposed, and assurance that adequate funds to defray any such non-Federal share will be available when needed;

"(D) assurance that such agency will cause work on the project to be commenced within a reasonable time and prosecuted to completion with reasonable diligence;

"(E) assurance that the rates of pay for laborers and mechanics engaged in the construction will be not less than the prevailing local wage rates for similar work as determined in accordance with sections 276a to 276a-5 of Title 40;

"(F) assurance that the school facilities of such agency will be available to the children for whose education contributions are provided in this chapter on the same terms, *in accordance with the laws of the State in which the school district of such agency is situated,* as they are available to other children in such school district; and

"(G) assurance that such agency will from time to time prior to the completion of the propect submit such reports relating to the project as the Commissioner may reasonably require." (Emphasis supplied.) 20 U.S.C.A. § 636 (b)(1).

The United States concedes, as it must, that when the statute was originally enacted the assurance in section 636 (b)(1)(F) was intended for an almost opposite purpose, as thus, explained in the report of the Committee on Education and Labor of the House of Representatives, No. 2810, 81st Cong., 2d Sess., p. 15 (1950):

"This provision is intended as a safeguard against discrimination against categories of children mentioned in the bill as such, but *it is not intended to disturb classification on jurisdiction or similar grounds, or patterns of racial segregation established in accordance with the laws of the State in which the school district is situated.*" [Emphasis added].

Again, the United States places its emphasis on the last clause just quoted: "in accordance with the laws of the State in which the school district is situated." Its argument is that, as the State law has necessarily changed to conform to the United States Constitution as construed in *Brown v. Board of Education,* 1954, 347 U.S. 483, the obligation of each local school board under that assurance has also changed.

The doctrine of primary jurisdiction [2] requires that that question be first decided by the federal Commissioner of Education to whom the administration of the statute is confided by section 642(b):

> "(b) The Commissioner of Education shall administer this chapter, and he may make such regulations and perform such other functions as he finds necessary to carry out the provisions of this chapter." 20 U.S.C.A. § 642(b).

The only provision of the statute which might possibly indicate a judicial remedy independent of the Commissioner of Education is that providing for repayment of unexpended funds:

> "(b) Any funds paid to a local educational agency under this chapter and not expended for the purposes for which paid shall be repaid to the Treasury of the United States." 20 U.S.C.A. § 637(b).

The United States does not seek repayment of any federal funds, but seeks to enjoin the local school board to operate the public schools under its jurisdiction so as not to segregate upon the basis of race or color the children of members and civilian employees of the Armed Services. However commendable may be that purpose, in our system of jurisprudence, the end cannot justify the means.

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[2] 3 Davis Administrative Law, section 19.01.

The only other remedy of which the statute can be said to fairly apprise any local school board is the administrative remedy subject to judicial review provided by section 641:

> "§ 641. *Withholding of payments for noncompliance; judicial review of commissioner's action in disapproving applications or withholding payments*
>
> "(a) Whenever the Commissioner of Education, after reasonable notice and opportunity for hearing to a local educational agency, finds (1) that there is a substantial failure to comply with the drawings and specifications for the project, (2) that any funds paid to a local educational agency under this chapter have been diverted from the purposes for which paid, or (3) that any assurance given in an application is not being or cannot be carried out, the Commissioner may forthwith notify such agency that no further payment will be made under this chapter with respect to such agency until there is no longer any failure to comply or the diversion or default has been corrected or, if compliance or correction is impossible, until such agency repays or arranges for the repayment of Federal moneys which have been diverted or improperly expended.
>
> "(b) The final refusal of the Commissioner to approve part or all of any application under this chapter, and the Commissioner's final action under subsection (a) of this section, shall be subject to judicial review on the record, in the United States court of appeals for the circuit in which the local educational agency is located, in accordance with the provisions of the Administrative Procedure Act." 20 U.S.C.A. § 641.

The long-established principle is applicable that: "A general liability created by statute without a remedy may be enforced by an appropriate common-law action. But where the

> provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

Pollard *v.* Bailey, 1874, 87 U.S. (20 Wall.) 520, 527.

The United States complains that the statutory remedy is wholly inadequate. That, however, is a matter appropriate for the consideration of Congress, especially in view of its obvious desire not to interfere with local control of the operation of the public schools, and of familiar legislative history that any such attempted control would prevent enactment of the statute, or if enacted, acceptance of the proffered aid by many of the local school boards where the greatest need might exist.

The briefs of counsel cite a wealth of legislative history which reinforces our conclusion, but we think the statutes so clear that this opinion need not be prolonged by a recital of that history. Clearly, the local school boards have not entered into any specifically enforceable contractual obligation not to assign federally connected children to local schools on the basis of race or color.

As an independent ground for relief, the United States urges that the violations of the Fourteenth Amendment rights of the children of members and employees of the Armed Forces burdens the exercise of the war power. The one district court which has decided with the United States on its principal and primary ground, adequately disposed of this alternative ground as follows:

> "The intrusion of the war power upon domestic affairs is not to be lightly sanctioned. The two cases, pertaining to the war power, cited by the plaintiff, Paul v. United States, 371 U.S. 245, 83 S.Ct. 426, 9 L.Ed.2d 292 (1963) and United States v. Georgia Public Service Commission, 371 U.S. 285, 83 S.Ct. 397, 9

> L.Ed.2d 317 (1963) prohibited state regulatory action in conflict with federal procurement statutes. Congress has not, however, enacted a statute defining a uniform national policy with regard to education of defendants [sic] of military personnel. On the contrary, Congress in 20 U.S.C. § 636(b) (1) (F) recognized that state, not federal law, should be the standard governing the education of the federally-connected children. This is exactly opposite from congressional action concerning the procurement statutes. The cases on the commerce clause cited by the plaintiff are not controlling for the same reason. The fact that the School Board has deviated from state law, does not permit the application of federal military policy, as defined by the executive branch of the Government."

United States v. County School Bd., Prince George County, Va., E.D. Va. 1963, 221 F.Supp. 93, 104.

The consequences of any attempted direct exercise of the war power outside of military bases without any authorization by Congress and during peace time are so extreme as to be unthinkable. The statutes relied on in the first ground demonstrate that if any State fails or refuses to furnish suitable public schools for federally connected children, the United States can and will itself provide such schools. No occasion can arise for the suggested unprecedented and extremely dangerous exercise of the war power to affect the operation of the public schools of the State.

Each of the judgments is

AFFIRMED.

APPENDIX B

United States Court of Appeals
for the Fifth Circuit

October Term, 1963

No. 20668

D.C. Docket No. 63-23—Civil

UNITED STATES OF AMERICA, APPELLANT

versus

MADISON COUNTY BOARD OF EDUCATION, ET AL., APPELLEES

Appeal from the United States District Court for the Northern District of Alabama

Before RIVES and CAMERON, Circuit Judges, and HUNTER, JR., District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 7, 1964.

Issued as Mandate: APRIL 24, 1964.

APPENDIX C

United States Court of Appeals for the Fifth Circuit

October Term, 1963

No. 20772

D.C. Docket No. 2678—Civil

UNITED STATES OF AMERICA, APPELLANT

versus

GULFPORT MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL., APPELLEES

Appeal from the United States District Court for the Southern District of Mississippi

Before RIVES and CAMERON, Circuit Judges, and HUNTER, JR., District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

JANUARY 7, 1964.

Issued as Mandate: April 24, 1964.

APPENDIX D

United States Court of Appeals for the Fifth Circuit

October Term, 1963

No. 20811

D.C. Docket No. 2643—Civil

UNITED STATES OF AMERICA, APPELLANT

versus

BILOXI MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL., APPELLEES

Appeal from the United States District Court for the Southern District of Mississippi

Before RIVES and CAMERON, Circuit Judges, and HUNTER, JR., District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

JANUARY 7, 1964.

Issued as Mandate: April 24, 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964